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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

GERARD PETIT,

Defendant and Appellant.

C057047

(Super. Ct. No.
07F01688)

A jury convicted defendant Gerard Petit of attempted grand theft (Pen. Code, §§ 664/487, subd. (a)–count one);¹ possession of burglary tools, a misdemeanor (§ 466–count two); and possession of a firearm by a convicted felon (§ 12021, subd. (a)(1)–count three). The jury acquitted defendant of assault with a firearm upon a sheriff’s deputy (count four). In connection with count one, the jury found true the allegation that defendant, while armed with a firearm in the commission of the offense, possessed ammunition designed primarily to penetrate metal or armor. (§ 12022.2, subd. (a).)

¹ All further statutory references are to the Penal Code unless otherwise indicated.

Sentenced to state prison, defendant appeals. He contends insufficient evidence supports the enhancement and that the ammunition he possessed is specifically exempted from section 12022.2. We will affirm the judgment.

FACTS

About 8:45 p.m. on February 18, 2007, law enforcement officers responded to an alarm at Cal-Steam, located in North Highlands, and found bolt cutters and a lock that had been cut on the ground next to an entry gate in a chain-link fence surrounding the business. Near a building on the property, officers found a U-Haul van containing two of Cal-Steam's water heaters, which cost \$495 apiece, and a tool bag containing saws, crowbars, and a hammer. Sheriff's Deputy Kyle Hoertsch and his canine, Rocky, walked around the property and saw an opening that had been cut in the fence. Rocky pulled the deputy to an area near the corner of the fence, where the canine located defendant lying on the ground and bit him on the hand; defendant yelled, "He's got me." On the ground near defendant, the deputy found a revolver pointed toward Rocky. The revolver fit in the holster found inside the vest defendant was wearing. Underneath defendant, officers found a key to the U-Haul van.

The revolver contained six rounds of .22-caliber ammunition. The tip of each bullet had been modified, that is, shaved to a point. According to Deputy Hoertsch, who qualified to testify as an expert, the pointed shape and caliber were

consistent with armor-piercing ammunition.² Additional facts will be recounted in our discussion of defendant's contentions.

DISCUSSION

Section 12022.2, subdivision (a) provides, in relevant part, as follows:

"(a) Any person who, while armed with a firearm in the commission or attempted commission of any felony, has in his or her immediate possession ammunition for the firearm designed primarily to penetrate metal or armor, shall upon conviction of that felony or attempted felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony, be punished by an additional term of 3, 4, or 10 years."

As defendant represents on appeal, CALCRIM does not provide a standard jury instruction for violation of section 12022.2. Without objection, the court instructed the jury on the section 12022.2, subdivision (a) enhancement, incorporating some of the language from section 12323,³ as follows:

² The court took judicial notice of section 12320 and read it to the jury as follows: "[A]ny person, firm or corporation who within this state knowingly possesses any handgun or ammunition designed primarily to penetrate metal or armor is guilty of a public offense."

³ Section 12323 provides: "As used in this chapter [chapter 2.6, Ammunition, §§ 12316-12325], the following definitions shall apply:

"(a) 'Handgun ammunition' means ammunition principally for use in pistols, revolvers, and other firearms capable of being concealed upon the person, as defined in subdivision (a) of Section 12001, notwithstanding that the ammunition may also be used in some rifles.

"If you find the defendant guilty of the crimes charged in Counts One and Four, you must then decide whether for these crimes, the People have proved the additional allegation that the defendant, during the commission of these crimes, was armed with a firearm, and had in his immediate possession, ammunition for the firearm designed primarily to penetrate metal or armor.

"A person who is armed with a firearm either carries the firearm, or has a firearm available. The term 'firearm' is defined in a different instruction.

"A firearm does not need to be in working order if it was designed to shoot and appears capable of shooting. The firearm does not need to be loaded.

"Handgun ammunition designed primarily to penetrate metal or armor, means any ammunition, except a shotgun shell, or

"(b) 'Handgun ammunition designed primarily to penetrate metal or armor' means any ammunition, except a shotgun shell or ammunition primarily designed for use in rifles, that is designed primarily to penetrate a body vest or body shield, and has either of the following characteristics:

"(1) Has projectile or projectile core constructed entirely, excluding the presence of traces of other substances, from one or a combination of tungsten alloys, steel, iron, brass, beryllium copper, or depleted uranium, or any equivalent material of similar density or hardness.

"(2) Is primarily manufactured or designed, by virtue of its shape, cross-sectional density, or any coating applied thereto, including, but not limited to, ammunition commonly known as 'KTW ammunition,' to breach or penetrate a body vest or body shield when fired from a pistol, revolver, or other firearm capable of being concealed upon the person.

"(c) 'Body vest or shield' means any bullet-resistant material intended to provide ballistic and trauma protection for the wearer or holder.

"(d) 'Rifle' shall have the same meaning as defined in paragraph (20) of subdivision (c) of Section 12020."

ammunition primarily designed for use in rifles, that is designed primarily to penetrate a body vest or body shield, and has either of the following characteristics:

"One, has projectile or projectile core constructed entirely, excluding the presence of traces of other substances, from one or a combination of tungsten alloys, steel, iron, brass, beryllium copper, or depleted uranium, or any equivalent material of similar density or hardness.

"Two, is primarily manufactured or designed by virtue of the shape, cross-sectional density, or any coating applied thereto, including, but not limited to, ammunition commonly known as KTW ammunition to breach or penetrate a body vest or body shield when fired from a pistol, revolver, or other firearm capable of being concealed upon the person.

"For the record, there should be an 'or' between one and two. The Court will add that to the instruction, in accordance with the statute.

"Body vest or shield means any bullet-resistant material intended to provide ballistic and trauma protection for the wearer or holder.

"You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime."

The court's instruction borrows from statutes that punish the possession, manufacture, importation, sale, or transportation of armor piercing *handgun* ammunition (§§ 12320-12321); those statutes exclude from their ambit rifle

ammunition, which, according to testimony, can have inherent armor-piercing qualities. Defendant contends the evidence is insufficient to establish that the bullets were primarily manufactured or designed to penetrate body armor, arguing that Deputy Hoertsch was not qualified as an expert on body armor and the evidence fails to establish that the bullets possessed the required metallurgic characteristics. Relying upon the definition of ammunition in section 12323 that was incorporated into the jury instruction given here, defendant contends the ammunition he possessed does not fall under section 12022.2, subdivision (a) because the bullets were for a rifle and not "primarily designed or manufactured to penetrate body armor."

We first consider whether substantial evidence supports the enhancement. "In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

At an Evidence Code section 402 hearing, Deputy Hoertsch testified that he received training on firearms and ammunition in the United States Army and the sheriff's academy, as well as 250 hours of postacademy training, and such training included no less than four hours solely on armor-piercing ammunition. Deputy Hoertsch had been a range instructor. Deputy Hoertsch

had spoken with people involved in the body armor industry about body armor and various types of ammunition. He had read various publications on the effects and use of various types of ammunition. Having inspected .22-caliber ammunition and shot the same about 500 times, he knew that a .22-caliber bullet has a "full metal jacket bull nose," meaning rounded, and knew of none that had been sharpened to a point. Deputy Hoertsch had previously qualified as an expert on armor-piercing ammunition at the preliminary hearing in this case. Deputy Hoertsch also knew from training that there were other properties of armor-piercing ammunition, such as the material used in the bullet's makeup. Deputy Hoertsch had been present at the range when new ammunition had been tested on body vests. The court deemed Deputy Hoertsch qualified to testify as an expert at trial on armor-piercing ammunition.

At trial, Deputy Hoertsch testified that he had used a .22-caliber long rifle and had shot at least 500 rounds with it. While in the Army for a total of seven years, both active and reserve, he had received basic marksmanship and additional weapons training, shooting .223-caliber rounds. He explained that caliber meant "the fragmented size of an inch for the projectile." While training to be a peace officer, he had received firearms and ammunition training in the academy. In training to become a firearms instructor, he took several courses on firearms over two weeks. He estimated he had about 250 hours of training on firearms. He had taught the basic recruit academy for several years to no less than 300 recruits

and taught advanced officer courses to about 100 officers. He had shot at least 25,000 rounds of various types of ammunition since entering the sheriff's academy.

Although not taught as a separate course, Deputy Hoertsch had received training in armor-piercing ammunition for no less than four hours. He explained that armor-piercing ammunition is identified by its shape, that is, tipped, as well as its material makeup. He knew of no certificate of training offered in armor-piercing ammunition. He knew that armor-piercing ammunition was illegal and not sold, and had never previously seen it in the field.

He admitted that rifle ammunition consisted of pointed bullets, where the points were centered; could be sold legally, such as .223 caliber; was all armor piercing but not called armor piercing; and was used for hunting, for accuracy, and to penetrate and expand to kill the prey quickly. He had previously fired rifle ammunition. As an officer, he had seen .22-caliber ammunition produced by various manufacturers about 50 times in the field. He described .22-caliber ammunition as "full metal jacket, bull-nosed round tip," meaning all one piece, consisting of a projectile, casing, primer, and ignition.

Deputy Hoertsch wore body armor every work day. Without objection, he described it as a "two panel vest, fit[ting in the] front and back, which is Kevlar and synthetic layered" and showed two vests to the jury. Without objection, he explained how a bulletproof vest works: "The two panels of Kevlar and synthetic fiber, basically sheets of material, that work in

combination with each other, that when a round hits it, it disperses the energy through the vest. [¶] . . . [¶] The projectile comes out of the weapon, hits the vest. And then the projectile—since what it's made out of is a softer metal, or metallic material, hits the vest and expands."

Deputy Hoertsch had observed ammunition, but not armor-piercing ammunition, shot at a bulletproof vest. He had seen training videos and spoken to others in his field about different types of ammunition and their effects. He had read articles about armor-piercing ammunition and altered ammunition. He explained that the pointed shape of armor-piercing ammunition "separates the nylon and synthetic fibers, allowing more penetration past the [body] vest." He identified a knife, ice pick, screwdriver, and other edged items as able to get through a bulletproof vest. He explained that a pointed tip on a .22-caliber round was small enough to cut through the fibers on a vest. He opined that the properties of the .22-caliber ammunition defendant possessed were consistent with armor-piercing ammunition, that is, "[t]he shaved tip into a point." He knew of no use for such ammunition other than to pierce a body vest. He admitted that .22-caliber ammunition could be used in a rifle. He explained that the projectile of the .22-caliber ammunition was lead and that if the material had been harder, such as depleted uranium, tungsten carbide, titanium, or possibly Teflon coated, the ammunition would more easily penetrate the vest. His opinion remained the same about the ammunition defendant possessed as consistent with armor-piercing

design based on the caliber and pointed shape, even assuming none of the harder materials made up the projectile.

Deputy Hoertsch demonstrated that he had special knowledge, experience, and training on .22-caliber bullets. His opinion on such bullets concerned a subject that is sufficiently beyond common experience that it assisted the trier of fact. (Evid. Code, §§ 720, subd. (a), 801.) That he may not have known all the materials used to make armor-piercing ammunition went to the weight of his testimony, not the admissibility. (*People v. Bolin* (1998) 18 Cal.4th 297, 322.) The trial court did not abuse its discretion in determining that Deputy Hoertsch was qualified to testify as an expert on armor-piercing ammunition. (*People v. Robinson* (2005) 37 Cal.4th 592, 630; *People v. Panah* (2005) 35 Cal.4th 395, 478; *People v. Chavez* (1985) 39 Cal.3d 823, 828.)

Defendant expressly notes that he does not challenge the trial court's ruling admitting Deputy Hoertsch's expert opinion. But defendant claims that the deputy was not qualified to express an expert opinion on body armor, shields, or vests.

Initially, we note that defendant did not object to Deputy Hoertsch's testimony on body vests and has forfeited the issue. (Evid. Code, § 353.) In any event, defendant misplaces his reliance upon *People v. Chapple* (2006) 138 Cal.App.4th 540. The defendant in *Chapple* was charged with violating Penal Code section 12370, subdivision (a), which prohibited a convicted felon from possessing body armor as defined by California Code of Regulations, title 11, section 942, subdivision (e)

(Regulations) (defining "body armor" as meaning "those parts of a complete armor that provide ballistic resistance to the penetration of the test ammunition for which a complete armor is certified"). The magistrate in *Chapple* determined that a law enforcement officer who retrieved a body vest upon arresting defendant did not qualify to testify as an expert at the preliminary hearing in order for him to identify a bullet proof vest as such, notwithstanding his years of experience of seeing and wearing such vests, since section 12370, subdivision (a) expressly incorporated by reference "body armor" as defined by the Regulations. The appellate court in *Chapple* determined that expert testimony on the specific certification standards for body armor was required. (*Chapple*, at pp. 543-545, 547-548.)

Here, defendant was not charged with a violation of section 12370. Instead, defendant was alleged to have violated section 12022.2, subdivision (a), a weapon enhancement, which prohibits a person who is armed with a firearm during the commission or attempted commission of any felony from possessing "ammunition for the firearm designed primarily to penetrate metal or armor." Further, section 12022.2, subdivision (a) refers to "metal or armor," not "body armor," and the Legislature did not incorporate by reference in section 12022.2, subdivision (a) the definition of body armor as used in the Regulations. Moreover, section 12022.2, subdivision (b) sets forth an enhancement for "[a]ny person who wears a body vest in the commission or attempted commission of a violent offense," and defines the language "body vest" in subdivision (c) as

meaning "any bullet-resistant material intended to provide ballistic and trauma protection for the wearer." No expert testimony on the specific certification standards for a body vest was required here where possession of the firearm and armor-piercing ammunition under the circumstances was the prohibited act.

We next consider whether the ammunition defendant possessed falls under the definition of prohibited ammunition in section 12022.2, subdivision (a). "It is well settled that the proper goal of statutory construction 'is to ascertain and effectuate legislative intent, giving the words of the statute their usual and ordinary meaning. When the statutory language is clear, we need go no further. If, however, the language supports more than one reasonable interpretation, we look to a variety of extrinsic aids, including the objects to be achieved, the evils to be remedied, legislative history, the statutory scheme of which the statute is a part, contemporaneous administrative construction, and questions of public policy. [Citation.]' [Citation.]" (*People v. Ramirez* (2009) 45 Cal.4th 980, 987.)

Again, section 12022.2, subdivision (a) prohibits "[a]ny person who, while armed with a firearm in the commission or attempted commission of any felony, has in his or her immediate possession ammunition for the firearm designed primarily to penetrate metal or armor."

Defendant points to the fact that the bullets he possessed *could have been used* in a rifle, as Deputy Hoertsch admitted in

cross-examination. Citing the language from section 12323, subdivision (b) incorporated in the instruction given here, defendant claims that the .22-caliber ammunition he possessed was long-rifle ammunition and specifically excluded.

Section 12323, subdivision (b) provides:

"(b) 'Handgun ammunition designed primarily to penetrate metal or armor' means any ammunition, except a shotgun shell or *ammunition primarily designed for use in rifles*, that is designed primarily to penetrate a body vest or body shield, and has either of the following characteristics:

"(1) Has projectile or projectile core constructed entirely, excluding the presence of traces of other substances, from one or a combination of tungsten alloys, steel, iron, brass, beryllium copper, or depleted uranium, or any equivalent material of similar density or hardness.

"(2) Is primarily manufactured or designed, by virtue of its shape, cross-sectional density, or any coating applied thereto, including, but not limited to, ammunition commonly known as 'KTW ammunition,' to breach or penetrate a body vest or body shield when fired from a pistol, revolver, or other firearm capable of being concealed upon the person." (Italics added.)

The definition of "handgun ammunition" pertains to sections of the Penal Code that create offenses relating to armor piercing handgun ammunition. Thus, section 12320 punishes the possession of armor piercing "handgun ammunition," and section 12321 punishes the manufacture, import, sale, or transportation of armor piercing "handgun ammunition." With

limited exceptions, set forth in section 12322, armor piercing handgun ammunition cannot be legally used or possessed. However, recognizing that rifle ammunition often has armor-piercing qualities as attested by Deputy Hoertsch, the quoted language from section 12323, subdivision (b) exempts rifle ammunition from the punishment prescribed in sections 12320 and 12321. The purpose of the exemption is easy to understand. Unlike handguns, rifles are used for lawful hunting activities and are not easily concealed. Therefore, the possession of rifle ammunition, absent circumstances of criminal use, is not punished.

However, section 12022.2, subdivision (a) addresses circumstances of criminal use, where a person commits or attempts to commit a felony while armed with a firearm and has in his possession ammunition for that firearm designed primarily to penetrate metal or armor. Rifle ammunition is not exempted. Such an exemption would make little sense where the firearm, whether handgun or rifle, and ammunition are used in a criminal enterprise.⁴

⁴ As the Attorney General notes, the definition of handgun ammunition set forth in section 12323 applies only to chapter 2.6 on ammunition (section 12316 et seq.) and thus does not apply to section 12022.2, subdivision(a), which falls under the chapter on firearms (chapter 1) and is a weapon enhancement. Any error in the court's instruction inured to defendant's benefit. However, as we note, portions of the instructions, as given, could not apply in light of the evidence presented.

Thus, the court's instructions on armor piercing handgun ammunition could not apply under the facts of this case. Here, defendant is not charged with violating sections 12320 or 12321, and in any event, the ammunition was not "primarily designed for use in rifles." Rather, it was primarily designed to be used in the handgun that he possessed during the offense of attempted grand theft. That the ammunition could have also been used in a rifle is of no moment. (*People v. Grubb* (1965) 63 Cal.2d 614, 620-621.)

In a related argument, defendant asserts that section 12022.2, subdivision (a) governs ammunition that is "primarily manufactured or designed" to penetrate a body vest or body armor and asserts the record is silent on whether the ammunition in question was "primarily manufactured or designed" for the specified purpose. Defendant also notes an absence of testimony on the metallurgic characteristics of the ammunition.

The enhancement set forth in section 12022.2, subdivision (a) applies to "ammunition . . . *designed primarily* to penetrate metal or armor." In common parlance, the word design means simply "to devise or propose for a specific function." (Webster's 3d New Internat. Dict. (1993) p. 611.) Here, defendant possessed .22-caliber ammunition that had been manually shaved to a point for use in his firearm, with which he was armed while attempting to commit the grand theft. Deputy Hoertsch testified at trial that .22-caliber ammunition has a bull nosed round tip, that armor-piercing ammunition has a pointed tip, and that the ammunition defendant possessed were

.22-caliber bullets that had been manually modified and shaved to a point for the purpose of making them armor piercing. That the ammunition was not originally manufactured to be armor piercing is not determinative. The metallurgic characteristics of the ammunition are irrelevant in light of the obvious design of the ammunition.⁵ Sufficient evidence supported the jury's finding on the enhancement.

Pursuant to this court's miscellaneous order No. 2010-002, filed March 16, 2010, we deem defendant to have raised the issue (without additional briefing) of whether amendments to section 4019, effective January 25, 2010, apply retroactively to his pending appeal and entitled him to additional presentence credits. As expressed in the recent opinion in *People v. Brown* (2010) 182 Cal.App.4th 1354, we conclude that the amendments do apply to all appeals pending as of January 25, 2010. Defendant is not among the prisoners excepted from the additional accrual of credit. (§ 4019, subds. (b) & (c); Stats. 2009, 3d Ex. Sess., ch. 28, § 50.) Consequently, defendant, having served 222 actual days of presentence custody, is entitled to 222 days of conduct credits. The court awarded 222 actual days and 110 days of conduct credit. Defendant is entitled to an additional 112 days of conduct credit.

⁵ This assumes the applicability of section 12323, subdivision (b).

DISPOSITION

The judgment is modified to provide for additional conduct credit of 112 days. The trial court is directed to prepare an amended abstract of judgment to reflect 222 actual days and 222 conduct days, for a total of 444 days of presentence custody credit, and to forward a certified copy of said amended abstract to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

RAYE, J.

We concur:

NICHOLSON, Acting P. J.

CANTIL-SAKAUYE, J.